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**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA**

STATE OF CALIFORNIA, by and through  
XAVIER BECERRA, Attorney General; and  
STATE OF NEW MEXICO, by and through  
HECTOR BALDERAS, Attorney General, et  
al.,

Plaintiff,

v.

UNITED STATES DEPARTMENT OF THE  
INTERIOR; OFFICE OF NATURAL  
RESOURCES REVENUE; RYAN ZINKE,  
Secretary of the Interior; and GREGORY  
GOULD, Director, Office of Natural Resources  
Revenue,

Defendants.

Case No. 17-cv-05948-SBA

NOTICE OF MOTION AND MOTION OF  
INSTITUTE FOR POLICY INTEGRITY AT  
NEW YORK UNIVERSITY SCHOOL OF  
LAW TO FILE AN AMICUS CURIAE  
BRIEF IN SUPPORT OF PLAINTIFFS

Judge: Hon. Sandra Brown Armstrong

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT the Institute for Policy Integrity (“Policy Integrity”) hereby  
moves the Court for leave to file the accompanying *amicus curiae* brief in the above-captioned case  
in support of Plaintiffs.

1 **I. LEGAL STANDARD**

2 The question of whether to grant permission to file an amicus brief lies solely within the  
3 discretion of the Court. *Hoptowit v. Ray*, 682 F.2d 1237, 1260 (9th Cir. 1982). “[A]n individual seeking  
4 to appear as amicus must merely make a showing that his participation is useful or otherwise desirable  
5 to the court.” *Woodfin Suite Hotels, LLC v. City of Emeryville*, No. C-06-1254, 2007 WL 81911, at \*3  
6 (N.D. Cal. Jan. 9, 2007) (Armstrong, J.). As such, district courts welcome amicus briefs where “the  
7 amicus has unique information or perspective that can help the court beyond the help that the lawyers  
8 for the parties are able to provide.” *NGV Gaming, Ltd. v. Upstream Point Molate, LLC*, 355 F. Supp.  
9 2d 1061, 1067 (N.D. Cal. 2005) (Conti, D.J.) (internal quotation marks omitted). And courts welcome  
10 briefs “from non-parties concerning legal issues that have potential ramifications beyond the parties  
11 directly involved.” *Sonoma Falls Developers, LLC v. Nevada Gold & Casinos, Inc.*, 272 F.Supp.2d  
12 919, 925 (N.D. Cal. 2003) (Walker, D.J.). Moreover, amicus briefs should normally be allowed when  
13 the amicus has an interest in the case. *See In re Heath*, 331 B.R. 424, 430 (9th Cir. B.A.P. 2005).  
14 Policy Integrity’s motion satisfies all of these factors.

15 **II. INTEREST OF *AMICUS CURIAE***

16 Policy Integrity has a strong interest in this case. Policy Integrity is a nonpartisan, not-for-  
17 profit think tank dedicated to improving the quality of government decisionmaking through advocacy  
18 and scholarship in the fields of administrative law, economics, and public policy, with a particular  
19 focus on environmental and economic issues. Areas of special concern for Policy Integrity include the  
20 proper valuation of the economic and environmental impacts of natural resource extraction as well as  
21 the proper assessment of costs and benefits for regulatory repeals. Policy Integrity consists of a team  
22 of legal and economic experts, trained in the estimation of costs and benefits and in the application of  
23 economic principles to regulatory decisionmaking. Our director, Richard L. Revesz, has published  
24 more than eighty articles and books on environmental and administrative law, including several works  
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1 that address the legal and economic principles that inform rational regulatory decisions.<sup>1</sup> Additionally,  
2 our policy director, Jayni Foley Hein, has written several articles and reports focused on natural  
3 resource management and conservation.<sup>2</sup>

4 In furtherance of its mission to promote rational decisionmaking, Policy Integrity has filed  
5 *amicus curiae* briefs addressing agency analysis of costs and benefits in many cases involving natural  
6 resource management. For example, in the U.S. Court of Appeals for the Tenth Circuit, Policy Integrity  
7 filed a brief supporting a challenge to the Bureau of Land Management’s (“BLM”) approval of four  
8 coal leases in Wyoming’s Powder River Basin. The brief pointed to basic economic principles to show  
9 that BLM’s failure to consider the impact of additional coal leases on coal consumption was irrational.  
10 Br. for Inst. for Policy Integrity, *WildEarth Guardians v. U.S. Bureau of Land Mgmt.*, 870 F.3d 1222,  
11 1235 (10th Cir. 2017). The Tenth Circuit agreed that the agency had improperly failed to consider the  
12 extent to which increased mining would, by lowering the price of coal, lead to increased coal  
13 consumption. *WildEarth Guardians*, 870 F.3d at 1235. The issue in *WildEarth Guardians* is relevant  
14 to the arguments Policy Integrity makes in part A.2 of its proposed amicus brief for this case.

15 In addition, Policy Integrity seeks to participate in this litigation because the case has the  
16 potential to affect the outcome of other similar cases, where Policy Integrity also has an interest. The  
17 Repeal Rule is one of the first of many agency rulemakings seeking to repeal a prior regulation under  
18 the new Presidential administration. Like the Repeal Rule, many of these rules implicate broad  
19 principles of agency decisionmaking, including the principles governing the analysis of costs and  
20 benefits in the context of a repeal.

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25 <sup>1</sup> See Richard L. Revesz, Publications, *available at*  
26 <https://its.law.nyu.edu/facultyprofiles/index.cfm?fuseaction=profile.publications&personid=20228>;  
27 *PHH Corp. v. Consumer Fin. Prot. Bureau*, 881 F.3d 75, 108-9 (D.C. Cir. 2018) (citing Professor  
28 Revesz’s scholarship in the majority opinion as well as several of the other concurring and  
dissenting opinions).

<sup>2</sup> Jayni Hein, Profile, <http://policyintegrity.org/jaynihein>.

1 Those broad principles are enshrined in the Administrative Procedure Act (APA). The APA  
2 requires an agency to “examine the relevant data and articulate a satisfactory explanation for its  
3 action.” *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Courts  
4 reverse where an examination of that explanation makes clear that the agency failed to consider “an  
5 important aspect of the problem.” *Id.* One important factor that agencies must address when explaining  
6 a decision is the cost that the decision imposes on society. Executive Order 12,866, which has  
7 governed regulatory decisionmaking since 1993 and continues to apply today,<sup>3</sup> instructs agencies to  
8 consider a regulation’s costs, including “any adverse effects . . . on health, safety and the natural  
9 environment.” Exec. Order No. 12,866 § 6(a)(3)(C)(ii), 58 Fed. Reg. 51,735 (Sept. 30, 1993). And  
10 courts have consistently required agencies to take the costs of their actions into account. *See Michigan*  
11 *v. EPA*, 135 S. Ct. 2699, 2707 (2015) (explaining that under 42 U.S.C. § 7412, “[n]o regulation is  
12 ‘appropriate’ if it does significantly more harm than good”); *New York v. Reilly*, 969 F.2d 1147, 1153  
13 (D.C. Cir. 1992) (remanding rule where agency failed to explain how economic benefits would justify  
14 forgoing promised air benefits); *Johnston v. Davis*, 698 F.2d 1088, 1094-95 (10th Cir. 1983)  
15 (remanding an environmental study because it made “no mention” of crucial factor that would make  
16 action net costly).

17 In the context of a repeal, costs include the forgone benefits of the repealed rule. *See Michigan*,  
18 135 S. Ct. at 2707 (“‘[C]ost’ includes more than the expense of complying with regulations; any  
19 disadvantage could be termed a cost.”). And failure to address those forgone benefits renders the repeal  
20 arbitrary and capricious. *California v. U.S. Bureau of Land Mgmt.*, 277 F. Supp. 3d 1106, 1122 (N.D.  
21 Cal. 2017) (holding that agency’s failure to consider forgone benefits was arbitrary and capricious);  
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27 <sup>3</sup> See Office of Mgmt. & Budget, Memorandum: Implementing Executive Order 13,771,  
28 Titled “Reducing Regulation and Controlling Regulatory Costs” pt. II (Apr. 5, 2017) (“EO 12866  
remains the primary governing EO regarding regulatory planning and review.”),  
<https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/memoranda/2017/M-17-21-OMB.pdf>.

1 *cf. Nat'l Ass'n of Home Builders v. EPA*, 682 F.3d 1032, 1039 (D.C. Cir. 2012) (finding that the agency  
2 properly calculated the costs of amending a regulation).

3 In this case, as explained in the proposed amicus brief, the Office of Natural Resources  
4 Revenue ("ONRR") has not adequately assessed the environmental and economic impacts of its  
5 decision to repeal the "Consolidated Federal Oil & Gas and Federal & Indian Coal Valuation Reform,"  
6 81 Fed. Reg. 43,338 (July 1, 2016) ("Valuation Rule"). *See* "Repeal of Consolidated Federal Oil &  
7 Gas and Federal & Indian Coal Valuation Reform," 82 Fed. Reg. 36,934 (Aug. 7, 2017) ("Repeal  
8 Rule"). In particular, ONRR has not explained its decision to forgo the Valuation Rule's benefits.

9 Policy Integrity has filed many amicus briefs critiquing agencies' economic analyses for  
10 regulatory repeals and suspensions similar to the Repeal Rule at issue in this case. For example, in this  
11 district, Policy Integrity filed a brief opposing BLM's decision to suspend a leak prevention rule  
12 without considering the forgone regulatory benefits. *See e.g., Br. for Inst. for Policy Integrity as*  
13 *Amicus Curiae, California*, 277 F. Supp. 3d at 1106. In that case, the court agreed that BLM's failure  
14 to consider the forgone benefits resulting from the suspension was arbitrary and capricious. *California*,  
15 277 F. Supp. 3d at 1123. In addition, Policy Integrity has filed amicus briefs regarding the failure to  
16 consider forgone benefits in challenges to regulatory delays, pending in the U.S. District Court for the  
17 Southern District of New York, *see Br. for Inst. for Policy Integrity as Amicus Curiae, New York v.*  
18 *Pruitt*, No. 18-1030 (S.D.N.Y. May 11, 2018), and the U.S. Courts of Appeals for the D.C. Circuit and  
19 Second Circuit, *see Br. for Inst. for Policy Integrity as Amicus Curiae, Air Alliance Houston v.*  
20 *Environmental Protection Agency*, No. 17-1155 (D.C. Cir. Nov. 1, 2017); *Br. for Inst. for Policy*  
21 *Integrity as Amicus Curiae, Natural Resources Defense Council v. National Highway Traffic Safety*  
22 *Administration*, No. 17-2780 (2d Cir. March 12, 2018).

23 In addition to the briefs discussed above, Policy Integrity has made similar arguments in public  
24 comments submitted on several *proposed* repeals, which may be finalized and litigated in the future.  
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1 See e.g., Proposed Repeal of Carbon Pollution Emission Guidelines for Existing Stationary Sources:  
2 Electric Utility Generating Units, 82 Fed. Reg. 48,035, 48,038 (Oct. 16, 2017).<sup>4</sup>

3 As in these other matters, Policy Integrity's interest in the current case is to ensure that agencies  
4 comply with their obligation to accurately assess the economic and environmental impacts of  
5 deregulatory decisions. Because the resolution of Plaintiffs' motion for summary judgment could  
6 affect these other challenges, as well as challenges that may be filed on repeals that are finalized in  
7 the future, this Court should grant Policy Integrity's motion to participate as *amicus curiae*. See  
8 *Sonoma Falls Developers, LLC*, 272 F. Supp. 2d at 925.

### 9 **III. POLICY INTEGRITY'S EXPERTISE WILL BENEFIT THE COURT**

10 Policy Integrity's proposed *amicus* brief is also useful to the court. Policy Integrity has  
11 experience with the rules at issue in this case, having submitted comments to ONRR on both the  
12 proposed Valuation Rule<sup>5</sup> and the proposed Repeal Rule.<sup>6</sup> Policy Integrity has harnessed that  
13 experience, as well as its expertise in cost-benefit analysis, to explain why ONRR's treatment of the  
14 Repeal Rule's economic impacts was arbitrary and capricious. While Plaintiffs have made arguments  
15 about ONRR's failure to provide a reasoned explanation for the Repeal Rule, Policy Integrity's focus  
16 on the agency's economic analysis is unique.

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22 <sup>4</sup> See also Institute for Policy Integrity, Comments on Repeal of Carbon Pollution Emission  
23 Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 82 Fed. Reg. 48,035  
24 Apr. 26, 2018),  
[http://policyintegrity.org/documents/04.27.18\\_Policy\\_Integrity\\_CPP\\_Repeal\\_Proposal\\_Comments.p](http://policyintegrity.org/documents/04.27.18_Policy_Integrity_CPP_Repeal_Proposal_Comments.pdf)  
df.

25 <sup>5</sup> See, e.g., Institute for Policy Integrity, Comments on ONRR's Proposed Reform of  
26 Consolidated Federal Oil and Gas and Federal and Indian Coal Valuation Rule (May 8, 2015),  
<https://www.regulations.gov/document?D=ONRR-2012-0004-0267>.

27 <sup>6</sup> Institute for Policy Integrity, Comments on ONRR's Proposed Repeal of Consolidated  
28 Federal Oil and Gas and Federal and Indian Coal Valuation Reform Rule (May 4, 2017),  
<https://www.regulations.gov/document?D=ONRR-2017-0001-0079>.

1           **IV.     MEET AND CONFER AND TIMELINESS**

2           Pursuant to the Court’s Standing Orders for Civil Cases, Policy Integrity has conferred with  
3 the parties concerning the filing of this motion. Plaintiffs consent to this motion. Intervenor-  
4 Defendants take no position on this motion. Defendants object to this motion.<sup>7</sup>

5           This motion is timely. Though this Court does not have rules governing the timing of *amicus*  
6 briefs, the Court may look for guidance to the rules of other district courts. In the U.S. District Court  
7 for the District of Columbia, the Local Rules require an amicus motion to be filed “in a timely manner  
8 such that it does not unduly delay the Court’s ability to rule on any pending matter.” Rules of the U.S.  
9 District Court for the District of Columbia, Local Rule 7(o)(2) at 31 (June 2018),  
10 <http://www.dcd.uscourts.gov/sites/dcd/files/LocalRulesJune2018.pdf>. In this case, there is more than  
11 enough time for the Court to decide Policy Integrity’s motion without unduly delaying the decision on  
12 the pending matter. Defendants’ combined opposition to Plaintiffs’ motion for summary judgment and  
13 cross-motion for summary judgment briefs is due on July 16, 2018, and Defendants’ reply brief on  
14 their own cross-motion is due on September 4, 2018, which gives the court more than two months to  
15 decide this motion prior to the close of briefing on the pending motions. Indeed, the Court need not  
16 rule on this motion at any time prior to decision on the summary judgment motions. The Court could  
17 simply decide all the motions at the same time. *See, e.g., WildEarth Guardians*, 870 F.3d at 1230  
18 (granting Policy Integrity’s motion to file an amicus brief over Intervenor-Appellees’ objection).

19           In addition, given this timing, Defendants will not be prejudiced in their ability to respond to  
20 the arguments raised in Policy Integrity’s proposed amicus brief, should they wish to do so. Defendants  
21 could rebut Policy Integrity’s arguments in their combined opposition to Plaintiffs’ motion for  
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25           <sup>7</sup> Federal defendants did not object to Policy Integrity’s motions to file any of the other  
26 amicus briefs mentioned here. Instead, federal defendants took no position on Policy Integrity’s  
27 motions to participate as amicus curiae in *New York v. Pruitt*, No. 18-1030 (S.D.N.Y.), and in  
28 *California v. United States Bureau of Land Management*, 277 F. Supp. 3d at 1106. And federal  
defendants consented to Policy Integrity’s filing of an amicus brief in *Air Alliance Houston v.*  
*Environmental Protection Agency*, No. 17-1155 (D.C. Cir.), and *Natural Resources Defense Council*  
*v. National Highway Traffic Safety Administration*, No. 17-2780 (2d Cir.).

1 summary judgment and cross-motion for summary judgment or in their reply brief. *Cf.* Order, *Sierra*  
2 *Club v. Zinke*, No. 17-cv-03885 (N.D. Cal. Aug. 10, 2017) (Laporte, M.J.) (setting deadline for amicus  
3 briefs for one day before plaintiffs' reply briefs on motions for summary judgment were due), ECF  
4 No. 41; *see also* Order, *California v. Zinke*, 17-cv-03804 (N.D. Cal. Aug. 8, 2017) (Laporte, M.J.),  
5 ECF. No. 33 (joint stipulation setting deadlines for briefing on motions for summary judgment in the  
6 related cases: *Sierra Club v. Zinke* and *California v. BLM*).

### 7 CONCLUSION

8 For the forgoing reasons, Policy Integrity respectfully requests that the Court grant this motion  
9 and accept for filing the accompanying *amicus curiae* brief.

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11 Dated: New York, NY  
12 June 25, 2018

Respectfully submitted,

/s/ Richard Revesz

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*Counsel for Amicus Curiae*

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1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on June 25, 2018, I electronically filed the NOTICE OF MOTION AND  
3 MOTION OF THE INSTITUTE FOR POLICY INTEGRITY AT NEW YORK UNIVERSITY  
4 SCHOOL OF LAW TO FILE AN *AMICUS CURIAE* BRIEF IN SUPPORT OF PLAINTIFFS'  
5 MOTION FOR SUMMARY JUDGMENT, along with exhibits, with the Clerk using the CM/ECF  
6 system, which I understand to have caused service of the filing to all counsel of record.

7 /s/ Richard Revesz  
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